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In the Supreme Court of the United States

OCTOBER TERM, 1998

GRUPO MEXICANO DE DESARROLLO, S.A., *et al.*,
Petitioners,

v.

ALLIANCE BOND FUND, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether a federal court has the power to enjoin defendants—over which it has personal jurisdiction and which have no defense on the merits—from dissipating their principal asset and rendering themselves judgment proof during the pendency of the litigation.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents' parent corporations are identified and any publicly held company that owns 10% or more of any Respondent's stock is listed in the Rule 29.6 Statement in Respondents' Brief in Opposition to the Petition for a Writ of Certiorari ii-iii.

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STATUTES AND RULES INVOLVED

Pertinent statutory provisions and rules are reprinted in an Appendix to this brief.

STATEMENT

The federal district court temporarily enjoined a foreign debtor from disposing of its principal asset pending the outcome of a civil action brought by investors to collect on notes issued by the debtor and guaranteed by its operating subsidiaries. The district court made findings of fact that the investors were "almost certain" to succeed on the merits; that the debtor was "at risk of insolvency if not already insolvent"; and that the debtor planned "to satisfy its Mexican creditors to the exclusion" of the investors. Pet. App. 25a-26a. The district court concluded: "In light of [the debtor's] financial condition and dissipation of assets, any judgment [the investors] obtain in this action will be frustrated" in the absence of a preliminary injunction. Pet. App. 26a.

The foreign debtor, despite admitting personal jurisdiction, insisted that the district court lacked power to enjoin its dissipation of assets and contended that judgment must be allowed to "follow in the ordinary course." Pet. App. 35a. The district court entered the preliminary injunction and the court of appeals affirmed.

A. GMD's Default On Guaranteed Notes And Its Dissipation Of Assets

Respondent Alliance Bond Fund, Inc., et al. (the "Investors") are investment funds that purchased, out of a $250 million offering, more than $75 million in principal amount of 8.25% notes due 2001 ("Notes") sold by Petitioner Grupo Mexicano de Desarrollo, S.A. ("GMD"), a Mexican conglomerate engaged in the construction business.[1] The Notes are unconditionally guaranteed by GMD's

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[1] This brief follows the convention of the court of appeals below and refers to the Respondents as the "Investors." Pet. App. 3a. Some of the Respondent investment funds are publicly offered open-end mutual funds with minimum investments of $250. *See* C.A. 13

operating subsidiaries, which are also Petitioners (collectively, the "Guarantors").

1. The Guaranteed Notes.—Although the Notes are unsecured obligations, they rank *pari passu* in priority of payment with all of GMD's other present and future unsecured debt. *See* C.A. 235-36. The Note instrument prohibits GMD from incurring any encumbrance or other lien on any of its assets, whenever acquired, as security for any indebtedness unless GMD secures the Notes equally and ratably with or prior to such indebtedness, with certain exceptions (the "Negative Pledge Covenant"). *See* C.A. 128-29. Interest payments on the Notes were due in February and August of each year. *See* C.A. 235. GMD used a portion of the proceeds from the Notes to repay debts incurred as a result of its participation in the construction of an inter-city toll road system in Mexico. *See* C.A. 38, 56-58.

2. The Failure Of The Mexican Toll Road Program And GMD's Default On The Notes.—From 1990 to 1994, GMD participated in the Mexican government's program to build an inter-city toll road system. As a result of economic uncertainty, currency devaluation, and other difficulties, the toll road program was a financial failure. *See* C.A. 236.

For its part, GMD suffered substantial losses when its invoices for work in building the toll roads (the "Toll Road Receivables") were not paid. *See* C.A. 264. In its Annual Report filed with the Securities and Exchange Commission for the 1996 fiscal year, GMD reported that its liabilities exceeded its assets and its independent auditors expressed "substantial doubt" that the company could continue as a going concern. *See* C.A. 222-23.

In August 1997, GMD defaulted on the interest payment then due on the Notes and the Guarantors defaulted on their obligations. *See* C.A. 4. Two months after its

(the confidential joint appendix in the court of appeals, a copy of which has been lodged with the Clerk of the Court).

default, on October 28, 1997, GMD issued a press release in which it reported revenues of approximately $119 million, a net loss of approximately $802 million through the third quarter of 1997, and a negative net worth of $214 million. *See* C.A. 214.

3. The Mexican Toll Road Rescue Program.—In response to the precarious financial situation facing the participants in the toll road program—including GMD—the Mexican government initiated a Toll Road Rescue Program. Under that program, the Mexican government promised to issue government-guaranteed notes ("Government Notes") that could be exchanged for Toll Road Receivables held by companies such as GMD. In return for the Government Notes, the Mexican government would assume control of the toll roads.

In October 1997, GMD publicly disclosed that it expected to receive at least $309 million in Government Notes in exchange for its Toll Road Receivables. *See* C.A. 265. According to GMD, the Government Notes are its "primary" asset. *See* C.A. 213, 220; Pet. Br. 2.

4. GMD's Assignment Of Government Notes To Mexican Creditors.—Despite the Negative Pledge Covenant and the *pari passu* status of the Notes, GMD publicly reported that it had pledged $117 million in Government Notes to satisfy various of its Mexican creditors. *See* C.A. 266-67. Because GMD did not possess Government Notes at the time of those pledges, it "irrevocably" assigned or placed in "trust" Tool Road Receivables that its Mexican creditors could later exchange for Government Notes. *See* C.A. 266-67.

B. The District Court's Entry Of A Preliminary Injunction To Preserve The *Status Quo* And Its Ability To Enter Effectual Relief

As a result of GMD's default on the August 1997 interest payment, the Investors accelerated the principal on their Notes. *See* J.A. 56-66. On December 12, 1997, they commenced an action for breach of contract. *See* J.A. 22-32. Because GMD had already pledged some of

the Government Notes to various of its Mexican creditors, the Investors moved for a temporary restraining order and a preliminary injunction to enjoin GMD from pledging or otherwise transferring its remaining interests in Government Notes, in order to maintain the *status quo* and preserve their damages remedy. *See* Pet. App. 22a-27a; J.A. 21-32. The Investors also moved for an order that GMD deposit the Government Notes, when issued, into a trust to be established under Mexican law. *See* J.A. 31. On December 12, 1997, the district court granted the Investors' motion for a temporary restraining order. *See* Pet. App. 56a. At the same time, it scheduled a hearing the following week on the Investors' motion for a preliminary injunction and their request for a trust. *See* Pet. App. 56a-57a.

1. The Hearings On The Investors' Motion For A Preliminary Injunction.—At the December 19, 1997 hearing on the preliminary injunction, GMD admitted that it was subject to personal jurisdiction in the district court and it did not challenge its liability on the Notes. *See* Pet. App. 33a.[2]

What is more, GMD disclosed for the first time that it had pledged between $214 and $258 million of Government Notes to its Mexican creditors—a fact that contradicted GMD's prior public disclosures and the sworn affidavit of its legal representative to the district court that it had pledged only $117 million of Government Notes. *See* C.A. 285-87; Pet. App. 40a. GMD also acknowledged its plan to pledge additional Government Notes to its Mexican creditors—a plan which would have left only $5.5 million of the original $309 million in Government Notes to satisfy the $75 million plus interest owed to the Investors. *See* C.A. 10, 228.

In light of those revelations, the district court asked: "why should I delay entry of that judgment simply because

[2] GMD and the Guarantors consented in the Note instrument and guarantee, respectively, to personal jurisdiction in any federal or state court in New York. *See* C.A. 135, 147.

the debtor is going to try to use the process of the court to delay entry of a judgment as to which there is no defense?" Pet. App. 36a. Following the hearing, the district court extended the temporary restraining order by consent of the parties to December 23, 1997, and asked the parties to draft a preliminary injunction to "preserve the issue status quo." Pet. App. 53a-54a.

After a hearing on December 23, 1997, the district court preliminarily enjoined GMD from further dissipating, transferring, or otherwise encumbering its interests in the Government Notes. *See* Pet. App. 26a. The district court found that the probability that the Investors would succeed on the merits was "almost certain." *Id.* In addition, the district court found that the Investors would be irreparably harmed absent a preliminary injunction and had no adequate remedy at law. *See id.* In support of that finding, the district court found that GMD had "a negative net worth of approximately $214 million" and "is at risk of insolvency if not already insolvent." Pet. App. 25a. The district court further found that GMD planned to use the Government Notes, which represented "72 percent" of its total current assets, "to satisfy its Mexican creditors to the exclusion of" the Investors and other holders of the Notes and had already encumbered certain Toll Road assets. Pet. App. 25a-26a. "In light of [GMD's] financial condition and dissipation of assets," the district court concluded that "any judgment [the Investors] obtain in this action will be frustrated" absent a preliminary injunction. Pet. App. 26a. Later that same day, the district court set a bond of $50,000 in accordance with Federal Rule of Civil Procedure 65(c). *See* Pet. App. 28a.

At no time did GMD contend that the district court was bound by the Rules of Decision Act, 28 U.S.C. § 1652 (1994), or this Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), to apply New York law to decide the Investors' motion for a preliminary injunction.

2. The Preliminary Injunction.—In accordance with Federal Rule of Civil Pr cedure 65(d), the district court crafted the preliminary injunction to bind only GMD, the

Guarantors, their representatives, and persons in active concert or participation with them. *See* Pet. App. 26a. The preliminary injunction gave the Investors no lien or other security interest in the Government Notes. *See id.* It gave the Investors no preference over GMD's other creditors. *See* Pet. App. 26a, 31a. And it provided expressly for the possibility that GMD might commence a proceeding under the insolvency or bankruptcy laws of Mexico or the United States:

> It is FURTHER ORDERED that nothing contained herein shall prohibit [GMD] from commencing any insolvency proceedings under any applicable law.

Pet. App. 27a; *see* J.A. 75, 77.

The preliminary injunction fashioned by the district court likewise had no effect on the rights of any existing assignees of GMD's Toll Road Receivables, including the Mexican government and its social security agency. Instead, the preliminary injunction applied prospectively to enjoin assignments of additional Toll Road Receivables or Government Notes by GMD. *See* Pet. App. 26a. Even as to prospective assignments, the district court expressly allowed for modification of the preliminary injunction upon application by GMD. *See* Pet. App. 51a, 53a; J.A. 78. Indeed, on February 5, 1998, GMD applied to the district court for release of some $7 million in Toll Road Receivables or Government Notes from the preliminary injunction. *See* J.A. 6. GMD, however, withdrew its motion. *See* J.A. 8.

Consistent with its sensitivity to the extraterritorial effect of its order, the district court denied the Investors' request for imposition of a Mexican trust over the Government Notes pending final judgment. *See* Pet. App. 26a-27a, 51a. The district court explained that it was not inclined "to start running things in Mexico" and observed that other interested parties were not before it. Pet. App. 30a, 37a-39a.

C. The Court Of Appeals' Decision On The Interlocutory Appeal From The Order Granting The Preliminary Injunction

On interlocutory appeal from the district court's order granting the preliminary injunction, GMD did not dispute the district court's findings of irreparable injury and likelihood of success on the merits. *See* GMD Br. 7. Instead, GMD contended that the district court had no power to issue a preliminary injunction under Federal Rule of Civil Procedure 65. *See* Pet. App. 6a ("GMD believes that Fed. R. Civ. P. 64 is the only procedural mechanism to prevent a litigant from concealing or transferring assets in order to frustrate a potential judgment."). The court of appeals rejected GMD's contention and affirmed the district court's order granting the preliminary injunction.

The court of appeals held that Rules 64 and 65 of the Federal Rules of Civil Procedure are not mutually exclusive. Notwithstanding the unavailability of relief under Rule 64, the court of appeals reasoned that the district court—because it had personal jurisdiction over GMD—had equitable power pursuant to Rule 65 to restrain GMD from dissipating its assets, even if those assets were located outside the district in which the court sat. *See* Pet. App. 6a-9a. In holding that the district court had power to grant the preliminary injunction, the court of appeals examined the decisions of this Court, the holdings of other courts of appeals, and its own decisions—including decisions expressing "great reluctance" to issue injunctions prohibiting conduct outside the district in which the court sits. Pet. App. 7a-8a.

The court of appeals concluded that, in the extraordinary situation, as here, where a defendant either is insolvent or is dissipating assets in frustration of a plaintiff's anticipated judgment, Rule 65 authorizes a district court temporarily to enjoin the defendant to maintain the *status quo* and protect the plaintiff's damages remedy. *See* Pet. App. 9a-18a. In reaching that conclusion, the court of appeals recognized that GMD's dissipation of Government Notes was an attempt to frustrate the Investors' eventual

judgment, rather than an effort legitimately to reduce GMD's debt and pay off creditors. Specfically, the court of appeals stated that the "plain import of [the district court's] findings is that the actions of GMD were less than benign." Pet. App. 17a. The court of appeals also held that the district court's finding that GMD planned to use the Government Notes to satisfy Mexican creditors to the exclusion of the Investors and other holders of the Notes "was adequately supported" in the record and stated that "GMD's duplicity in disclosing the full extent of its assignment [of its interests in the Government Notes] further support[ed] this conclusion." Pet. App. 17a-18a.

On appeal, GMD did not contend that the district court's order was contrary to the Rules of Decision Act, 28 U.S.C. § 1652, or this Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64.

D. Subsequent Proceedings In The District Court And Court Of Appeals

On January 8, 1998, after it had filed its interlocutory appeal, GMD answered the Investors' complaint and asserted four counterclaims seeking damages of at least $153 million for alleged "wrongful interference" by the Investors with GMD's efforts to restructure its financial operations. J.A. 83-91. On February 19, 1998, the Investors moved to dismiss the counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(6) and for summary judgment on their breach-of-contract claim. *See* J.A. 110. GMD submitted no opposition to the motion to dismiss and did not contest the award of money damages. *See* J.A. 111.

On April 17, 1998, the district court entered final judgment in favor of the Investors and against GMD in the amount of $82,444,259 and entered an order dismissing the counterclaims with prejudice. *See* Pet. App. 58a-59a; J.A. 110-12. In both the judgment and order, the district court converted the preliminary injunction into a permanent injunction pending satisfaction of the award of money damages. *See* Pet. App. 59a; J.A. 112.

On April 20, 1998, GMD filed a notice of appeal from "so much" of each of the district court's April 17, 1998 judgment and order that (1) required GMD to turn over to the Investors Toll Road Receivables or Government Notes in an amount sufficient to "satisfy the Judgment" (the "Turnover Order"); and (2) "convert[ed]" the preliminary injunction into a permanent injunction. J.A. 113-14. In its opening brief in the court of appeals, however, GMD abandoned its appeal from the conversion of the preliminary injunction into a permanent injunction:

> GMD has decided not to appeal that portion of the Order converting the preliminary injunction into a permanent injunction.

Brief of Defendants-Appellants in No. 98-7549, *Alliance Bond Fund, Inc. et al. v. Grupo Mexicano de Desarrollo, S.A.* (2d Cir. July 1, 1998), at 7 n.3.

On May 1, 1998, the court of appeals stayed the Turnover Order pending GMD's appeal, but the permanent injunction is "unaffected" and "remains effective." J.A. 115-16. On December 10, 1998, the court of appeals heard oral argument on the appeal, which is currently pending before that court.

SUMMARY OF ARGUMENT

I. This interlocutory appeal is moot. In the court of appeals below, GMD contended that the district court lacked power to enter the preliminary injunction restraining it from dissipating its assets pending the outcome of the litigation. While the interlocutory appeal was pending, the district court entered a permanent injunction into which the preliminary injunction merged. As a consequence, the preliminary injunction no longer exists and there is no live case or controversy regarding the district court's power to enter it.

Contrary to GMD's contention, a claim for damages for being wrongfully enjoined does not save an interlocutory appeal from mootness. In *University of Texas v. Camenisch*, 451 U.S. 390 (1981), this Court held that although a damages claim prevents the *case* from becom-

ing moot, it does not save the *interlocutory appeal* from becoming moot. An interlocutory appeal—which is a narrow exception to the strong federal policy against piecemeal review—presents the question whether the district court had discretion to enter the preliminary injunction and properly exercised that discretion. It does not present the question whether the injunction defendant is entitled to damages. That question arises, and GMD's damages claim would have accrued, only if (and after) it had prevailed on the merits and all subsequent appeals.

In this case GMD has no damages claim for being wrongfully enjoined because it lost on the merits and voluntarily abandoned its appeal from the permanent injunction. By acquiescing in the district court's exercise of the very power it challenges on this interlocutory appeal, GMD forfeited any claim that it was wrongfully enjoined. Accordingly, the appeal is moot and the petition for a writ of certiorari should be dismissed.

II. If the Court determines that it may reach the merits, it should affirm. The district court had personal jurisdiction over the parties and had power to issue a preliminary injunction against GMD to restrain it from dissipating its principal asset pending the outcome of the litigation, in order to preserve the *status quo* and protect its ability to render an effectual judgment. This Court's decisions in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), and *United States v. First National City Bank*, 379 U.S. 378 (1965), support the district court's preliminary injunction in principle, and its decision in *De Beers Consolidated Mines v. United States*, 325 U.S. 212 (1945), is entirely consistent with it.

Even if the district court's power to enjoin temporarily the dissipation of assets presented a question of first impression in this Court (which it does not), the order granting the preliminary injunction should nonetheless be affirmed. This Court has consistently held that federal equity power is flexible and adaptable to new situations. Although GMD contends that federal equity power is confined to circumstances in which there exists a "traditional predicate" for its use, the cases on which it relies for that proposition concern not equitable power, but inherent power. The concern posed by inherent power—*i.e.*, the lack of democratic sanction—has no resonance with equitable power, which Congress gave the federal courts beginning with the Judiciary Act of 1789.

Nor does Federal Rule of Civil Procedure 64, which incorporates state prejudgment attachment law, impliedly limit federal courts' power to issue preliminary injunctions under Federal Rule of Civil Procedure 65. The equitable power of federal courts incorporated in Rule 65 is not subject to limitation absent a "clear statement," which Rule 64 plainly is not. Moreover, the issuance of preliminary injunctions under Rule 65 cannot circumvent Rule 64 because the separate origins of the two rules demonstrate that they operate independently of each other.

III. GMD's attempt to avoid federal law—by contending that the Rules of Decision Act, 28 U.S.C. § 1652, and *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, require the application of New York law—is not properly before this Court and is without merit. The *Erie* issue is neither fairly included in the question presented nor pressed or passed on by any of the courts below. Even if it were, and state law governed the issuance of injunctions by federal courts in diversity cases, the preliminary injunction entered in this case is consistent with New York law and this Court would have no occasion to address the *Erie* issue.

In any event, federal law governs the issuance of preliminary injunctions in federal court. Under this Court's decision in *Hanna v. Plumer*, 380 U.S. 460 (1965), state law does not govern the issuance of injunctions by federal courts because Rule 65 governs that procedure. In the alternative, even if federal law conflicted with state law, the federal interest in having uniform equitable remedies and entering effectual judgments outweighs the state interest in discouraging forum shopping between state and federal courts.

ARGUMENT

I. THIS INTERLOCUTORY APPEAL HAS BEEN RENDERED MOOT BY THE CONVERSION OF THE PRELIMINARY INJUNCTION INTO A PERMANENT INJUNCTION FROM WHICH GMD HAS NOT PROSECUTED AN APPEAL

GMD appealed from the district court's entry of the preliminary injunction. While that appeal was pending in the court of appeals, however, the district court entered a final judgment that, among other things, converted the preliminary injunction into a permanent injunction. As a consequence of that final judgment, the preliminary injunction merged into the final decree and ceased to exist. Accordingly, this interlocutory appeal from the order granting the preliminary injunction is moot.[3]

Contrary to GMD's contention (Pet. 10), its hypothetical claim against the $50,000 preliminary injunction bond (J.A. 80) does not present a live case or controversy on this interlocutory appeal, for two independent reasons. To begin with, the only issue on this interlocutory appeal is the propriety of the preliminary injunction, which has ceased to exist. GMD's hypothetical damages claim (if preserved) would have had to await final judgment and the completion of all subsequent appeals. Thus, even if GMD had a damages claim that prevented the *case* from becoming moot, it would not have saved this *interlocutory appeal* from becoming moot.

In any event, GMD has forfeited even a hypothetical claim for damages caused by the preliminary injunction because it acquiesced in the permanent injunction in the

[3] The Investors pointed out the inconsistency between GMD's petition to this Court and its failure to prosecute an appeal from the permanent injunction in their brief in opposition. *See* Respondents' Brief in Opposition to Petition for Writ of Certiorari 4 n.3. Even if the Investors had not raised mootness in their brief in opposition, mootness may be raised for the first time in the briefs on the merits and cannot be waived, because it deprives the Court of a live case or controversy as required by Article III. *See, e.g., North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

court below. GMD would have had a hypothetical damages claim only if it had prevailed on the merits. It did not. *See* J.A. 110-12. Although GMD noticed an appeal from that portion of the final judgment granting a permanent injunction, *see* J.A. 113, it abandoned that appeal in the court below, *see supra* p. 9. As a consequence, GMD has abandoned any possible claim for damages caused by the issuance of injunctive relief.

A. This Interlocutory Appeal Is Moot Because The Preliminary Injunction Has Been Converted Into A Permanent Injunction And No Longer Exists

It is black-letter law that an interlocutory appeal from an order granting a preliminary injunction is moot if the preliminary injunction is made permanent:

> A preliminary injunction, if granted, lasts only until a final decree is entered; it is merged in and does not survive the entry of a final decree. If, therefore, an appeal is taken from an order granting or denying a temporary injunction, and before the appeal is heard a final decree is entered by the trial court, the appeal will be dismissed as moot. More obviously, where an appeal is taken from an order granting or denying a temporary injunction, and before the appeal is heard a final judgment is entered and an appeal is taken from the final judgment, the appeal from the interlocutory order will be dismissed.

42 AM. JUR. 2D *Injunctions* § 355, at 1166-67 (1969) (footnotes omitted).

Consistent with that rule, this Court has consistently dismissed interlocutory appeals from orders granting preliminary injunctions if a permanent injunction is entered. *See Sterling v. Constantin*, 287 U.S. 378, 386 (1932); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 588-89 (1926).[4]

[4] *See also Champlin Ref. Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 224 (1932) (dismissing interlocutory appeal of order denying preliminary injunction); *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U.S. 196, 205-06 (1924) (same); *Home Tel. & Tel. Co. v.*

The preliminary injunction that GMD challenges on this interlocutory appeal ceased to exist when, on April 17, 1998, the district court converted the preliminary injunction into a permanent one. *See* Pet. App. 59a; J.A. 112. At that time, the preliminary injunction became *functus officio* ("a task performed," BLACK'S LAW DICTIONARY 673 (6th ed. 1990)) and this interlocutory appeal became moot. *See* 42 AM. JUR. 2D *Injunctions* § 317, at 117-18 ("When the final decree is granted, the provisions of the temporary injunction become functus officio, or are merged in it or dissolved thereby, and no formal order of dissolution is necessary to the validity and effectiveness of the decree." (footnotes omitted)). Because the preliminary injunction no longer exists, it follows that this interlocutory appeal from the order granting that injunction is moot.

B. GMD's Hypothetical Damages Claim For Being Wrongfully Enjoined Does Not Save This Interlocutory Appeal From Mootness

To be sure, a party found to have been wrongfully enjoined has a claim against the injunction bond for damages proximately caused by the preliminary injunction and that claim prevents the *case* from becoming moot. But that hypothetical claim is not at issue in an interlocutory appeal from an order granting a preliminary injunction and it does not save the *interlocutory appeal* from becoming moot. To the contrary, that damages claim must await the trial on the merits and all subsequent appeals therefrom. It would come before this Court, if at all, only on appeal from a final judgment, at which time this Court would have the benefit of a fully developed factual record and an opinion of the court of appeals on that record. In this case, GMD has forfeited even that hypothetical claim by abandoning its appeal of the permanent injunction. Because GMD has acquiesced in the district court's power to restrain its

Kuykendall, 285 U.S. 206, 208-09 (1924) (same); *Shaffer v. Carter*, 252 U.S. 37, 44 (1920) (same).

dissipation of assets, for purposes of the permanent injunction, it may not challenge that power on interlocutory appeal from the preliminary injunction.

1. *GMD's Hypothetical Damages Claim Is Not Presented On This Interlocutory Appeal From The Order Granting The Preliminary Injunction*

Damages from being wrongfully enjoined are not presented on an interlocutory appeal from an order granting a preliminary injunction. An interlocutory appeal from an order granting a preliminary injunction is authorized by 28 U.S.C. § 1292(a)(1) (1993), which is an exception to the general federal policy "against piecemeal appeals." *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966); *see also* GMD C.A. Br. 4 (resting interlocutory appeal in this case on § 1292(a)(1)). The purpose of § 1292(a)(1) is to permit litigants "to effectually challenge interlocutory orders of serious, perhaps irreparable consequences." *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955). An interlocutory appeal from an order granting a preliminary injunction thus presents the narrow question whether the district court had the discretion to issue the injunction and properly exercised that discretion.[5]

By contrast to the narrow question presented on interlocutory appeal from an order granting a preliminary injunction, a claim for damages arising out of being wrongfully enjoined necessarily accrues only *after* the defendant prevails at the trial on the merits and all subsequent appeals therefrom. Federal Rule of Civil Procedure 65(c) requires security for a preliminary injunction "for the

[5] *See, e.g., Synanon Found., Inc. v. California*, 444 U.S. 1307, 1307 (1979) (Rehnquist, J., Circuit Justice) ("preliminary injunction should be reversed by this Court . . . only when the judge's 'discretion was improvidently exercised.'" (*quoting Alabama v. United States*, 279 U.S. 229, 231 (1929)); *Brown v. Chote*, 411 U.S. 452, 457 (1973) ("In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion.").

payment of such costs and damages as may be incurred or suffered by any party who is *found to have been wrongfully enjoined* or restrained" (emphasis added). A defendant can be "found to have been wrongfully enjoined" only after a trial on the merits resulting in a judgment in favor of the enjoined party and affirmance on appeal.[6] Withholding recovery until a final merits determination is not only the rule, it is right. If a plaintiff obtains a permanent injunction after a full trial on the merits and further prevails on all appeals, then the defendant was not "wrongfully enjoined" by the preliminary injunction.[7] Regardless of whether the district court correctly predicted which party would succeed on the merits, plaintiff in fact succeeded and the final decree retroactively validates the anticipatory relief.[8]

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[6] Although this Court has not construed Rule 65(c), the lower courts that have construed that Rule hold that a party is "wrongfully enjoined" only if it is ultimately determined that it had the right at all times to do what it was enjoined from doing. *See, e.g., Nintendo of America, Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1036 (9th Cir. 1994); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054 (2d Cir. 1990); *see also* 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2972, at 458 (2d ed. 1995) ("The motion [to proceed against the surety on an injunction bond] will not precede the final determination on the merits." (footnotes omitted)).

[7] *See, e.g.*, Note, *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 HARV. L. REV. 828, 839 (1986) ("If the court determines on the merits of the case that the defendant did not have a right to engage in the activity, a procedural error in granting the injunction is irrelevant; the defendant was not unjustly or 'wrongfully' damaged by being deprived of the ability to cause illegal injury to the plaintiff."); *id.* at 837-38; Note, *Interlocutory Injunctions and the Injunction Bond*, 73 HARV. L. REV. 333, 336 (1959) ("If the interlocutory injunction is ultimately made permanent, the anticipatory remedy amounts to a retroactive effectuation of the plaintiffs' right."); *id.* at 340.

[8] *See* 43A C.J.S. *Injunctions* § 319, at 704-05 (1978) ("[L]iability on the bond is not incurred if the cause in which the bond was issued terminated adversely to defendant therein and a final decision was rendered that the injunction was rightfully issued. This is so, although the temporary injunction was vacated, dissolved, dismissed, or discharged."); *id.* § 316, at 701, § 320, at 706-07.

In accordance with the foregoing reasoning, this Court held in *University of Texas v. Camenisch*, 451 U.S. 390, that an interlocutory appeal taken from an expired preliminary injunction is moot—even if the question of damages persists. In *Camenisch*, a deaf graduate student had filed suit to force a state university to pay for a sign-language interpreter to enable him to pursue a masters degree. *See id.* at 391-92. The district court granted a preliminary injunction that required the university to provide the interpreter and the student posted a $3,000 bond. *See id.* at 392. During the university's interlocutory appeal, the student graduated and the preliminary injunction expired. *See id.* at 393. This Court held that, although the *case* was not moot (because a live controversy remained over whether the university must pay for the interpreter), the *interlocutory appeal* from the order granting the preliminary injunction had become moot. This Court explained that distinction at length (*id.* at 393-94 (internal quotations and citations omitted)): and concluded (*id.* at 393-94 (internal quotations and citations omitted)): "This, then, is simply another instance in which one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot."

This Court specifically rejected the university's argument —echoed by GMD here—that "[t]he determination of whether [GMD] suffered damages requires first that this Court determine whether the injunction was improperly granted." Pet. 10; *see* GMD Br. 7. Contrary to GMD's contention, "when the injunctive aspects of a case become moot on appeal of a preliminary injunction, any issue preserved by an injunction bond can generally not be resolved on appeal, but must be resolved in a trial on the merits." 451 U.S. at 396. This Court explained:

> [L]iability on the injunction bond could not arise until there was a final judgment in favor of the defendant. "This rule is consistent with the policy considerations behind the injunction bond. The requirement of security is rooted in the belief that a defendant deserves protection against a court order granted without the full deliberation a trial offers."

Id. at 397 (quoting *American Bible Society v. Blount*, 446 F.2d 588, 595 n.12 (3d Cir. 1971)). Thus, this Court would address any issue preserved by the injunction bond "on appeal of the correctness of the trial court's decision on the merits." 451 U.S. at 396.

The only authority GMD offers (GMD Br. 7; Pet. 10) in support of its contention that this interlocutory appeal is *not* moot—the decision of the Second Circuit in *H.E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13, 17-18 (2d Cir. 1963)—does not even mention mootness. To the contrary, that decision held only that the preliminary injunction at issue in that case had been "improvidently issued." *Id.* at 17. What is more, the Second Circuit's statement in that case that "substantial expenses in transportation and perhaps in fabrication have *already* been incurred" suggests that some other expenses had not yet been incurred and that the controversy over the preliminary injunction was not moot. *Id.* (emphasis added).[9]

[9] In the court below, GMD also cited the Second Circuit's decision in *Meyers v. Jay St. Connecting R.R.*, 288 F.2d 356, 359 (2d Cir. 1961). In a three-sentence summary order that relied solely on *Meyers*, the court of appeals below rejected the Investors' suggestion of mootness. *See* J.A. 118. Depending on which appeal that order addresses, the summary order is either mistaken (if addressed to the interlocutory appeal) or correct (if addressed to the appeal from the final judgment).

On the one hand, if the summary order addresses the mootness of this interlocutory appeal—as did both the Investors' suggestion of mootness and GMD's opposition—then it is mistaken. *Meyers* holds only that expiration of a *permanent* injunction does not moot an appeal if the defendants have a claim against the injunction bond. *See* 288 F.2d at 357-59 & n.2.

On the other hand, if the summary order addresses the mootness of the appeal from the final judgment, it was correct at the time it was made because GMD had noticed an appeal from the permanent injunction (*see* J.A. 113) and thus had a live claim against the injunction bond. The procedural history of the Investors' mootness suggestion is necessary to understand what occurred in the court below. On April 17, 1998, the Investors suggested that the interlocutory appeal from the preliminary injunction (Second Circuit Docket No. 97-9610) had been rendered moot by the district court's final judgment. *See* J.A. 108. On April 20, 1998, after the Investors had filed their suggestion of mootness, but before the court of appeals had ruled on it, GMD appealed two portions of that final judgment—the Turnover Order and the permanent injunction—which were assigned Second Circuit Docket No. 98-7549. *See* J.A. 113-14. On May 4, 1998, two days before it was to issue its opinion on the interlocutory appeal (No. 97-9610), the court of appeals issued its summary order that rejected the suggestion of mootness. That order, however, bore the docket number of the appeal from the final judgment (No. 98-7549), not from the interlocutory appeal (No. 97-9610). *See* J.A. 117-18. Reading the summary order to apply to the appeal from the final judgment is consistent not only with the docket number on that order, but also with the Second Circuit's citation of *Meyers*, which (as noted above), concerns mootness of an appeal from a permanent injunction, not an interlocutory appeal from a preliminary injunction. *See* 288 F.2d at 357-59 & n.2.

Although it is not a part of the record in this case, the parties brought the possible clerical error to the attention of one of the Second Circuit's staff counsel, but the Second Circuit did not change the docket number on its summary order.

2. *GMD's Failure To Prosecute Its Appeal From The Permanent Injunction Forecloses Its Claim For Damages From Being Wrongfully Enjoined*

GMD abandoned any claim it might have had for damages from being "wrongfully enjoined" when it failed to prosecute its appeal from that portion of the final

judgment that converted the preliminary injunction into a permanent injunction.

It is firmly settled that a defendant may be "found to have been wrongfully enjoined" and entitled to damages against an injunction bond only if it prevails on the merits and all subsequent appeals therefrom. *See* authorities cited *supra* p. 6 & nn. 6-8. GMD lost on the merits, however, and the district court entered a final judgment "convert[ing]" the preliminary injunction into a permanent injunction. Pet. App. 59a; J.A. 112. Although GMD noticed an appeal (among other things) from "[s]o much" of the district court's order and judgment "converting" the preliminary injunction "into a permanent injunction," J.A. 113, it abandoned that part of its appeal in its opening brief in the court of appeals below: "GMD has decided not to appeal that portion of the Order converting the preliminary injunction into a permanent injunction." Brief of Defendants-Appellants in No. 98-7549, *Alliance Bond Fund, Inc. et al. v. Grupo Mexicano de Desarrollo, S.A.* (2d Cir. July 1, 1998), at 7 n.3. By abandoning its appeal of the permanent injunction, GMD necessarily forfeited any claim that it had been "wrongfully enjoined" within the meaning of Federal Rule of Civil Procedure 65(c). Hence, any issue that would otherwise have been preserved by the injunction bond is moot. The mootness of this interlocutory appeal thus follows *a fortiori* from *Camenisch*.[10]

II. FEDERAL EQUITY POWER AUTHORIZED THE PRELIMINARY INJUNCTION ISSUED BY THE DISTRICT COURT

This case exemplifies the proper exercise of federal equity power. The district court had personal jurisdiction over all the parties and thus plainly had power to issue a preliminary injunction "to preserve the relative positions

[10] GMD's voluntary abandonment of its appeal means that the proper disposition is to dismiss the case as moot. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994).

of the parties until a trial on the merits c[ould] be held." *Camenisch*, 451 U.S. at 395. In the situation that faced the court, plaintiffs had a just debt; defendants had no defense on the merits; and defendants would have used the delay inherent in the judicial process to dissipate their principal asset and render the judgment that would inevitably issue uncollectible. *See* Pet. App. 17a-18a, 26a. In response to that situation, the district court fashioned a narrowly drawn preliminary injunction that temporarily enjoined defendants from dissipating what remained of their principal asset, but neither disturbed prior assignments nor prevented the defendants from commencing insolvency proceedings to resolve their financial difficulties. *See supra* p. 6. The district court did enough to preserve the *status quo* and its ability to enter an effectual judgment ,but no more. Among other things, it refused to place GMD's assets in trust under Mexican law pending the outcome of the case. *See supra* p. 6.[11]

Notwithstanding the district court's measured exercise of its equitable power, GMD contends (GMD Br. 10 (emphasis added)) that federal courts may "*never* . . . issue a preliminary injunction to preserve assets to satisfy a potential money judgment." If accepted, GMD's contention would render federal courts "powerless to protect a potential future damages remedy against a recalcitrant defendant with highly liquid assets, no matter how wrongful its conduct, how bad the injury it caused, or how brazen its attempt to evade judgment by secreting assets."

[11] The district court also declined to disturb any past assignments of assets, which included assignments to the Mexican government and its social security agency, and authorized GMD to invoke the bankruptcy laws of Mexico. *See supra* p. 6. The court of appeals was similarly sensitive to the extraterritorial effect of the preliminary injunction and emphasized that such power must be "exercised with great reluctance." Pet. App. 8a. Consequently, *amicus curiae* the Dominican Republic's contention (Br. 15-16) that the lower courts' decisions were not informed by a concern for principles of comity is belied by the record.

Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 194 (3d Cir. 1990).[12] No decision of this Court or principle of equity requires this Court to acquiesce in a defendant's use of the delays inherent in the judicial process to dissipate its principal asset and avoid a just debt.

Contrary to GMD's contention (GMD Br. 10-18), federal courts have broad equity power to enjoin the dissipation of assets pending the outcome of litigation in order to preserve the *status quo* and protect the court's ability to enter an effectual judgment. Although this Court has never had occasion to pass on the precise preliminary injunction entered by the district court below, *Deckert v. Independence Shares Corp.*, 311 U.S. 282, and *United tSates v. First National City Bank*, 379 U.S. 378, support the district court's order in principle. It is only an incremental and logical step from the Court's holdings in those cases to an affirmance of the preliminary injunction at issue in this case.

A. Federal Courts Have Broad Equitable Power To Enjoin Temporarily The Use Of Assets To Maintain The *Status Quo* And Protect Their Ability To Render Effectual Judgments

The Court's decisions in *Deckert* and *First National City Bank* support the district court's preliminary injunction in principle and its decision in *De Beers Consol. Mines v. United States*, 325 U.S. 212, is entirely consistent with it.

1. *Deckert v. Independence Shares Corporation*

In *Deckert*, this Court held that the district court had power to issue a preliminary injunction against the dissipation of assets by a defendant which was "insolvent and its assets in danger of dissipation or depletion," for the

[12] The court of appeals here observed that "[t]he plain import of [the district court's] findings is that the actions of GMD were less than benign." Pet. App. 17a. Those findings established that GMD "was improperly establishing a priority of creditors." *Id.* "GMD's duplicity in disclosing the full extent of its assignments [of Toll Road Receivables] fully supports this conclusion." *Id.*

purpose of "preserv[ing] the status quo pending final determination of the questions raised by the bill." 311 U.S. at 290. *Deckert* was a suit in equity under the federal securities laws to rescind a securities contract allegedly induced by fraud and for restitution of the consideration paid. *See id.* at 288-89. In light of the defendant's insolvency and the danger of dissipation of its assets, this Court unanimously affirmed the district court's order granting a preliminary injunction to restrain a third-party trustee from transferring funds to the defendant or otherwise dissipating the funds:

> "It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal, an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion." As already stated, there were allegations that Independence was insolvent and its assets in danger of dissipation or depletion. This being so, the legal remedy against Independence, without recourse to the fund in the hands of Pennsylvania, would be inadequate.

Id. at 290 (citations omitted) (quoting *Prendergast v. New York Tel. Co.*, 262 U.S. 43, 50-51 (1923), and *Meccano, Ltd. v. Wanamaker*, 253 U.S. 136, 141 (1920)).

Contrary to GMD's contention (GMD Br. 11), *Deckert* does not "stand[] for the proposition that a preliminary equitable remedy will issue to preserve a final equitable remedy of restitution or constructive trust when the plaintiff has an equitable claim to a specific *res* or thing in the possession of the defendant." To be sure, Deckert and his co-plaintiffs proceeded by a bill in equity. *See* 311 U.S. at 284. But that procedural posture formed no part of this Court's *ratio decidendi*. To the contrary, this Court in *Deckert* held that the plaintiffs in Securities Act cases, such as the one before it, could proceed by action at law *or* suit in equity: "[T]he [Securities] Act as a whole indi-

cates an intention to establish a statutory right which the litigant may enforce in designated courts by such *legal or equitable* actions or procedures as would normally be available to him." *Id.* at 287-88 (emphasis added). After noting that the jurisdictional grant in the Securities Act includes "suits in equity and actions at law" (*id.* at 288), the Court explained—without drawing a distinction between law and equity—that the right of recovery implies the availability of procedures to effectuate that recovery (*id.* (emphasis added)):

> The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize *any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.*

GMD's attempt to limit *Deckert* to suits in equity is entirely contrived and finds no basis in the reasoning of this Court.

2. *United States v. First National City Bank*

As in *Deckert*, this Court in *First National City Bank* held that a district court with personal jurisdiction over the defendant has power to enjoin the transfer of assets by that defendant in order to preserve the *status quo* and protect against the further dissipation of assets. *See* 379 U.S. at 385. In *First National City Bank*, the United States brought an action to foreclose a tax lien on the property of a Uruguayan corporation, including bank accounts held in First National City Bank's foreign branches. *See id.* at 379-80. "[A]ffidavits filed with the complaint averred that [the Uruguayan corporation] was removing its assets from the United States." *Id.* at 380. On that basis, the district court granted the government's motion for a preliminary injunction and temporarily enjoined First National City Bank from transferring any property or rights to property of the Uruguayan corporation whether "within or without the United States." *Id.*

This Court framed the question presented and its answer solely in terms of personal jurisdiction. The question presented was (*id.*):

> Since it [the district court] has personal jurisdiction over respondent [First National City Bank], has it power to grant the interim relief requested?

The Court answered that question in the affirmative (*id.* at 384):

> Once personal jurisdiction of a party is obtained, the District Court has authority to order it to "freeze" property under its control, whether the property be within or without the United States.

In light of the affidavits suggesting that the Uruguayan corporation was removing its assets from the United States, the Court found "[t]he temporary injunction issued by the District Court . . . to be eminently appropriate to prevent the further dissipation of assets." *Id.* at 385.

As it did with *Deckert*, GMD contends (GMD Br. 13) that the holding in *First National City Bank* is limited to suits in equity and has no application to actions at law "for money damages." As with *Deckert*, GMD attempts to graft its law/equity distinction on this Court's opinion even though that distinction finds no basis in the reasoning of this Court. Indeed, the Court's reasoning—that personal jurisdiction supplies the power to enjoin temporarily the dissipation of assets (*see id.* at 384)—flatly rejects the distinction on which GMD relies.[13]

Nor is it fair to read the Court's discussion of *De Beers* in *First National City Bank* as limiting the use of

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[13] Although a statute authorized the district court to grant the injunction at issue in *First National City Bank*, the text of that statute—which authorized injunctions "necessary or appropriate" to enforce the Internal Revenue Code (379 U.S. at 380 (quoting 26 U.S.C. § 7402(a))—added nothing to the federal court's traditional equity power. In any event, this Court based its holding not on the peculiarities of a tax injunction statute, but on the district court's authority over a party subject to the personal jurisdiction of the court. *See id.* at 384.

preliminary injunctions to assets that are the "ultimate relief sought in the litigation." GMD Br. 13. In distinguishing the result in *First National City Bank* (which upheld the preliminary injunction) from the result in *De Beers* (which did not), this Court in *First National City Bank* reasoned that the preliminary injunction in that case was proper because the bank accounts would be the subject of a final judgment if the plaintiff prevailed. By contrast, the injunction in *De Beers* was improper because the property at issue there could not have been the subject of the final judgment given that the only relief available in that case was an injunction against future unlawful conduct:

> Unlike *De Beers Consol. Mines v. United States*, 325 U.S. 212, there is here property which would be "the subject of the provisions of any final decree in the cause." *Id.*, 220. We conclude that this temporary injunction is "a reasonable measure to preserve the status quo" (*Deckert v. Independence Shares Corp.*, 311 U.S. 282) pending service of process on [the Uruguayan corporation] and an adjudication of the merits.

379 U.S. at 385. *First National City Bank*, therefore, requires not that the plaintiff claim an equitable interest in the enjoined property, but only that the property be subject to a final judgment. In the case presently before the Court, the enjoined property was subject to the final judgment not only because it would satisfy the judgment of $82,444,259 that GMD owed to the Investors, but also because the district court in its final judgment ordered the enjoined property to be turned over to the Investors. *See* Pet. App. 59a; J.A. 111.

The preliminary injunction issued by the district court below is fully consonant with the one upheld in *First National City Bank*. In both cases, the district court had personal jurisdiction over the foreign defendant; plaintiff satisfied all the prerequisites for a preliminary injunction; the defendant was effectively dissipating its principal asset; the dissipation of the assets would have

rendered a judgment in plaintiff's favor ineffectual; and plaintiff sought a money judgment for a specific amount of money. The primary difference between the two cases is that the government in *First National City Bank* sought to foreclose a lien while the plaintiffs in this case seek to collect a debt. That is a distinction without a difference. As this Court held in *First National City Bank*, the district court's power to enjoin the dissipation of assets pending the outcome of litigation rests on its personal jurisdiction over the defendant, not on any characteristic of the assets the defendant might dissipate.

3. *De Beers Consolidated Mines v. United States*

Between *Deckert* and *First National City Bank*, both of which approved of preliminary injunctions to enjoin the dissipation of assets, this Court decided *De Beers*. In that case, the Court reversed a preliminary injunction as inconsistent with the "principles of equity" (325 U.S. at 219), because the injunction restrained the use of property that "in no circumstances can be dealt with in any final injunction that may be entered" (*id.* at 220).

In *De Beers*, the United States brought an equitable action against several foreign corporations and individuals in which it sought a permanent injunction prohibiting future violations of the antitrust laws. The government did not, and could not, sue for money damages. As the Court explained (*id.* at 219-20):

> Under the Sherman Act and the Wilson Tariff Act, the District Court has no jurisdiction in this suit to enter a money judgment. Its only power is to restrain the future continuance of actions or conduct intended to monopolize or restrain commerce.

Although the final relief sought by the United States could not affect the defendants' property, the government nonetheless obtained an *ex parte* restraining order against banks in which the defendants had accounts and that order was continued in a preliminary injunction. *See id.*

at 216. In support of that relief, the government's counsel filed an affidavit which stated that defendants sold abroad and required payment in advance (*see id.*) and argued that the injunction would provide security in the event contempt proceedings were necessary to enforce the final decree (*see id.* at 215). As the Court explained, "[i]n truth the purpose and effect of the injunction is to provide security for performance of a future order which may be entered by the court." *Id.* at 219. "Its issue," the Court pointed out, "furthermore presuppose[d] or assume[d]" an eight-step hypothetical causal chain. *Id.*

This Court reversed the preliminary injunction on the ground that the "general principles which govern the granting of equitable relief" (*id.* at 218-19) do not authorize the issuance of a preliminary injunction to restrain assets which could not be affected by the final judgment and which would at most provide security for a hypothetical contempt judgment (*id.* at 220):

> It [the district court], of course, has the power, pending final action in this respect, to restrain action or conduct violative of the statute. A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally. The injunction in question is not of this character. It is not an injunction in the cause, and it deals with a matter lying wholly outside the issues in the suit. It deals with property which in no circumstances can be dealt with in any final injunction that may be entered.

The Court concluded that a preliminary injunction may not be sustained "as a method of providing security for compliance with other process which conceivably may be issued for satisfaction of a money judgment for contempt." *Id.* at 220.

Unlike *De Beers*, here there is no dispute that the assets that GMD seeks to dissipate would be used to satisfy a final judgment in favor of the Investors. Indeed, those very assets were subject to the district court's subsequent Turnover Order. GMD contends, however, that *De Beers* should be given an expansive reading and understood to mean that "a preliminary injunction may not issue to secure assets for a final judgment if the assets to be restrained are not of the same 'character' as the subject of the plaintiff's underlying action." GMD Br. 11. By that, GMD contends that the preliminary injunction must be "directly related" (GMD Br. 12) to the "same *res* or thing that is the subject of [the plaintiff's] underlying claim" (GMD Br. 10).

Contrary to GMD's contention (GMD Br. 10-12), *De Beers* does not draw a distinction between assets that are directly related, on the one hand, or indirectly related, on the other hand. As this Court itself explained, the preliminary injunction at issue in *De Beers* was improper because the defendants' bank accounts could "in no circumstances" (325 U.S. at 220) be the subject of the final judgment, not because their relationship to the case was not sufficiently direct. Moreover, a test that turns on the proximity of the relationship between the assets and the subject matter of the litigation—such as that proposed by GMD—would be impossible to apply in practice. In this case, for example, GMD used $108 million of the net proceeds from the sale of the Notes to repay debt incurred, in part, to refinance its investment in the toll roads. *See* C.A. 38, 56-58. The Government Notes referenced in the preliminary injunction are thus "directly related" to the Notes because the proceeds from the sale of those Notes helped finance the construction of the toll roads and the Toll Road Receivables are, in turn, the assets to be exchanged for the Government Notes.

Nor is it fair to suggest that this Court was concerned in *De Beers* with "extending a district court's equitable powers to issue preliminary injunctions outside of the subject matter of the plaintiff's claim." GMD Br. 12. Instead, this Court was concerned with restraining the use of assets that could "in no circumstances" be affected by the final judgment. 325 U.S. at 220. And this Court was especially concerned that such a gratuitous restraint might

be imposed based solely on a lawyer's affidavit—on "a mere statement of belief that the defendant can easily make away with or transport his money or goods." 325 U.S. at 222. But this Court's concern with the gratuitous restraint in *De Beers* has no application here. As the court of appeals pointed out: "this 'parade of horribles' will not come to pass. The defendant's rights are adequately protected because the traditional requirements for obtaining equitable relief must be met before a district court may issue an injunction." Pet. App. 15a. Thus, a preliminary injunction restraining the dissipation of assets cannot issue on "a mere statement of belief" that the defendant "can" transfer his assets. The concern underlying *De Beers* is particularly misplaced in this case. GMD conceded in the court below that the Investors would likely succeed on the merits and would be irreparably harmed in the absence of the preliminary injunction. *See* GMD Br. 7.

Lastly, GMD contends that permitting a district court to enjoin temporarily the dissipation of assets in cases for money damages would stand "the rationale for this Court's decision on its head" and lead to "the anomalous conclusion that a district court presiding over an action at law for money damages has more expansive power to award interim equitable relief . . . than a court adjudicating an equitable claim." GMD Br. 13-14. Not so. After the fusion of law and equity in the federal courts, a district court has precisely the same power to award interim equitable relief in actions at law and suits in equity. As this Court explained in *De Beers*, "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." 325 U.S. at 220. Only if the final relief cannot affect assets would *De Beers* prohibit a preliminary injunction restraining the use of those assets. *See id.* Because the Government Notes could "be dealt with in any final injunction that may be entered" (*id.*), the preliminary injunction entered by the district court below is entirely consistent with this Court's decision in *De Beers*.

B. The Application Of Federal Equity Power Is Not Confined To Situations In Which It Has Traditionally Been Applied

The preliminary injunction issued by the district court in this case is in principle no different from the ones approved by this Court in *Deckert* and *First National City Bank*. It is also readily distinguishable from the one reversed by this Court in *De Beers*. Accordingly, the preliminary injunction order should be affirmed on those authorities alone.

The preliminary injunction order would also be sustainable even if this case were deemed to be one of first impression. The district court had personal jurisdiction over GMD and the Guarantors and they concede that the preliminary injunction satisfies the standard for such relief —namely, that the Investors were likely to succeed on the merits of their claim and would suffer irreparable injury in the absence of preliminary injunctive relief. *See supra* p. 7. GMD disagrees.

GMD contends that federal courts' equity power "must be exercised with caution and restraint" (GMD Br. 15 (internal quotation omitted)); that preliminary injunctions are "appropriate" only if they are used "in circumstances where such long unquestioned 'power is of ancient origin,' " (GMD Br. 15 (internal quotation omitted)); and that "[t]here is no traditional predicate for the preliminary injunction issued by the district court in this case" (GMD Br. 16). GMD's grudging reading of federal equity power is inconsistent with this Court's exposition of equitable power and confuses the equity power granted by Congress with the inherent power asserted by the federal courts.

1. Contrary to GMD's contention (GMD Br. 15), this Court has never intimated that federal equity power should be exercised with "caution and restraint." Rather, this Court has consistently painted federal equity power in broad and flexible terms.[14] In particular, this Court has

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[14] *See, e.g., International Salt Co. v. United States*, 332 U.S. 392, 400-01 (1947) (the district courts "are invested with large discre-

emphasized that a hallmark of equity is its flexibility and adaptability to new situations. *See, e.g., Hecht Co. v. Bowles,* 321 U.S. 321, 329-30 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."). Accordingly, federal courts have adapted and applied traditional equitable principles to redress new wrongs:

> The ingenuity of man in devising new forms of wrong cannot outstrip equity in its development. In all situations and under all circumstances, whether new or old, the principles of equity will point the way to justice where legal remedies are infirm. Precedents will be a constant guide, but never a bar. Where a new condition exists, and legal remedies afforded are inadequate or none are afforded at all, the never failing capacity of equity to adapt itself to all situations will be found equal to the case, extending old principles, if necessary, not adopting new ones, for that purpose.

1 JOSEPH STORY, EQUITY JURISPRUDENCE § 4, at 5 (14th ed. 1918).

2. GMD's cramped view of federal equity power rests on its conflation of equitable power with inherent power. The cases on which GMD relies concern not equitable power, but inherent power. *See* GMD Br. 15, 18 (*citing, e.g., Chambers v. NASCO,* 501 U.S. 32, 44 (1991); *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764 (1980); *Link v. Wabash R.R. Co.,* 370 U.S. 626, 629-30 (1962); *Snyder v. Harris,* 394 U.S. 332, 340 (1969)). The Court construes inherent power narrowly because it is implied by the courts without the authority of either

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tion to model their judgments to fit the exigencies of the particular case"); *Hecht Co. v. Bowles,* 321 U.S. 321, 329 (1944) ("sound discretion" conferred on federal district courts); *Prendergast v. New York Tel. Co.,* 262 U.S. 43, 50-51 (1923) ("the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court"); *Meccano, Ltd. v. Wanamaker,* 253 U.S. 136, 141 (1920) ("sound discretion of the trial court").

of the political branches of government. *See, e.g., Degen v. United States,* 517 U.S. 820, 823 (1996) ("The extent of [inherent] powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority."); *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764 (1980) ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.").[15]

Whatever modesty marks this Court's exercise of inherent power has no application to equitable power. Congress vested the federal courts with equity jurisdiction beginning with the Judiciary Act of 1789. That Act conferred upon the inferior federal courts jurisdiction "of all suits . . . in equity." Judiciary Act of 1789, ch. 20, 1 Stat. 73, 78.[16] Because equity jurisdiction emanates

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[15] Even if Congress had not given equity jurisdiction to the inferior federal courts, those courts' inherent power would support preliminary injunctions against the dissipation of assets at least in extraordinary cases, such as the one below, where the defendants filed a false affidavit, failed to raise arguable defenses or prosecute alleged counterclaims, and otherwise used the delays inherent in the judicial process to buy time to dissipate their principal asset in an effort to deprive the plaintiffs of payment on a just debt. *See supra* pp. 4-6. This Court need not explore the outer limits of federal courts' inherent power to issue preliminary injunctions in this case, however, because the congressional grant of equitable power is more than ample to sustain the preliminary injunction issued by the district court here.

[16] The phrase "suits in equity" "has been understood to refer to suits in which relief is sought according to the principles applied by the English Court of Chancery before 1789, as they have been developed in the federal courts." *Gordon v. Washington,* 295 U.S. 30, 36 (1935).

The historical background to the First Judiciary Act demonstrates that Congress's decision to vest the inferior federal courts with equity power was a considered one and not simply a reflexive incorporation of a practice familiar from colonial days. When the Members of Congress debated the First Judiciary Act in 1789, the anti-chancery party favored the complete abolition of equity juris-

from Acts of Congress, the federal courts should not be reluctant to exercise equity power and they should not confine the exercise of that power to situations for which they can identify a "traditional predicate." GMD Br. 16.[17]

3. The development and successful use of *Mareva* injunctions demonstrate that (a) the power to enjoin the dissipation of assets pending the outcome of litigation flows from traditional equitable principles and (b) that power is essential to preserve the *status quo* and protect courts' power to do justice in commercial disputes involving assets that are increasingly intangible, impermanent, and instantly transferable. The *Mareva* injunction is an interlocutory remedy that originated in England. It enables a court to freeze the assets of a defendant over which it has personal jurisdiction to prevent that defendant from frustrating a potential judgment by disposing of those assets or removing them from the jurisdiction. *See*

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diction. *See, e.g.*, Charles E. Clark & James Wm. Moore, *A New Civil Procedure*, 44 YALE L.J. 387, 397 (1935). After a heated contest, however, the anti-chancery party was defeated and the Act ultimately provided for jurisdiction "of all suits . . . in equity," 1 Stat. 73, 78, except "[t]hat suits in equity shall not be sustained in either of the Courts of the United States, in any case where plain, adequate and complete remedy may be had at law." Ch. 20, 1 Stat. 73, 82; *see* 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 2App.100[1] (3d ed. 1998).

[17] Contrary to GMD's contention (GMD Br. 16), the English Chancery Court's decision in *Lister & Co. v. Stubbs*, [1890] 45 Ch. D. 1 (Eng. C.A.), does not establish that "until 1975, the English Courts of Chancery did not possess the power to grant an interlocutory order enjoining a defendant from disposing of its assets or removing them from the jurisdiction before a judgment was rendered." As GMD's own description of *Lister* suggests, the English Chancery Court declined to issue an interlocutory order based on the facts of that case, not a lack of power. *See* GMD Br. 16 (the "plaintiff could not show that the undisclosed commissions . . . was money belonging to the plaintiff"). Tellingly, Lister & Co., which was the plaintiff in that case, did not even allege that its former employee, who was the defendant, was dissipating assets or was insolvent and would be unable to satisfy a money judgment if the company prevailed on its claim.

RICHARD N. OUGH AND WILLIAM FLENLEY, THE MAREVA INJUNCTION AND ANTON PILLER ORDER 3 (2d ed. 1993). *Mareva* injunctions do not give plaintiffs any lien or security interest in the frozen assets and are thus similar to the preliminary injunction issued by the district court below. *See id.*[18] *Mareva* injunctions have been issued by courts in most common law countries, including the United Kingdom, Australia, Canada, Malaysia, New Zealand, and Singapore. *See, e.g.*, Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Money Judgments*, 67 WASH. L. REV. 257, n. 337 (1992).

Although the English Chancery Court recognized the *Mareva* injunction in its 1975 decision in *Mareva Compania Naviera, S.A. v. International Bulk Carriers, S.A.*, [1975] 2 Lloyd's Rep. 509 (Eng. C.A.), that decision rests on the traditional uncodified power of the Chancery Court to issue injunctions in cases in which it would be "just or convenient." The *Mareva* Court based its decision on section 45 of the Judicature Act of 1925, which re-enacted section 25(8) of the Judicature Act of 1873, which in turn provided: "A mandamus or injunction may be granted . . . in all cases in which it shall appear to the court to be just or convenient." The Judicature Act of 1873 itself merely codified the Chancery Court's equitable powers. *See North London Ry. Co. v. Great Northern Ry. Co.*, [1883] 11 Q.B.D. 30, 37-39, per Brett and Cotton, L.J.J. (the Judicature Act of 1873 "has not given any Court a jurisdiction which no Court had before . . . there is nothing in the Judicature Act which enables any part of the High Court to issue an injunction in a case in which before the Judicature Act there was no legal right . . . or no legal liability . . . ."); I.C.F. SPRY, THE PRINCIPLES OF EQUITABLE REMEDIES 330-31 (5th ed. 1997) ("The actual power or jurisdiction to grant injunctions

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[18] The requisite showing to obtain a *Mareva* injunction is comparable to the showing required for a grant of injunctive relief pursuant to Rule 65. *See, e.g.*, Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Money Judgments*, 67 WASH. L. REV. 257, 339-47 (1992).

has remained the same, since, given jurisdiction over the person of the defendant, in courts of equity it has always been without limit, and could indeed be exercised . . . in the creation of a new equitable right, as the court thought fit . . . ."); Marion Hetherington, *Introduction to the Mareva Introduction, in* MARVEVA INJUNCTIONS 7-8 (Marion Hetherington ed., 1983) ("the [1873] enactment was merely procedural in that it extended equity's injunctive power to the common law courts without increasing the scope of that jurisdiction."). The power to issue *Mareva* injunctions thus flows from the same uncodified equity jurisprudence that Congress bequeathed to the federal courts. GMD's suggestion that the original *Mareva* injunction is a creature of statute (*see* GMD Br. 17 n.8) is without merit.

English courts have found *Mareva* injunctions to be singularly effective, in the extraordinary cases to which they apply, and a necessary tool to ensure that English judgments are not frustrated:

> We live in a time of rapidly growing commercial and financial sophistication and it behoves the courts to adapt their practices to meet the current wiles of those defendants who are prepared to devote as much energy to making themselves immune to the court's orders as to resisting the making of such orders on the merits of their case.

Derby & Co. Ltd. v. Weldon, [1989] 1 All E.R. 1002, 1007; *see Babanaft Int'l Co. S.A. v. Bassatne* [1988] 1 All E.R. 433, 444 ("some situations, which are nowadays by no means uncommon, cry out, as a matter of justice to plaintiffs, for . . . *Mareva*-type injunctions covering foreign assets of defendants even before judgment.").

Adoption of GMD's theory that injunctions may issue only if they can be traced back to a "traditional predicate" (GMD Br. 16) would shackle federal equitable power to the "circumstances" in which it was "exercise[d]" (GMD Br. 15) in colonial times. It would foreswear preliminary injunctions against the dissipation of assets in commercial litigation no matter how duplicitous the defendants, how mobile the assets, or how frivolous the pleadings interposed to delay the judicial process and avoid judgment on a just debt. It would also call into question the availability of injunctions outside commercial law, in cases to redress violations of civil rights, unfair competition, trademark infringement, trade secret misappropriation, and other substantive law. Injunctive relief in many of those areas developed after 1789, and even if statutes authorize the issuance of injunctions in some cases, the grants of judicial authority simply refer back to traditional equitable principles—which would be ossified by the legal theory GMD advances in this case.

C. The Exercise Of Federal Equity Power As Codified In Rule 65 Is Independent Of And Does Not Circumvent State Prejudgment Attachment Law Incorporated By Rule 64

GMD declares (GMD Br. 18) that Federal Rule of Civil Procedure 64, which incorporates state prejudgment attachment law, is "the exclusive source of district court authority to grant provisional remedies," even though it "does not state [that] in so many words." On that half-hearted premise, GMD contends (GMD Br. 20) that permitting the district court to issue a preliminary injunction under Federal Rule of Civil Procedure 65 would "circumvent" Rule 64.

Contrary to GMD's contention (GMD Br. 18, 20), the equitable power of federal courts, which is codified in Rule 65, is not subject to limitation absent a "clear statement," which Rule 64 plainly is not. Moreover, the application of Rule 65 cannot circumvent Rule 64 because the separate origins of the two rules demonstrate that they operate independently of each other.

1. Limitations on federal equitable power are subject to a "clear statement" rule and Rule 64 is not such a clear statement. As this Court declared in *Porter v.*

Warner Holding Co., 328 U.S. 395, 398 (1946): "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." [19] GMD concedes, as it must, that Rule 64 "does not state in so many words that it is the exclusive source of district court authority to grant provisional remedies." GMD Br. 18. It follows that the state prejudgment attachment laws incorporated by Rule 64 do not limit federal courts' equity power codified by Rule 65.

It is no answer to contend, as does GMD (GMD Br. 18-20), that district courts must rely on "text-based authority derived from Congress rather than inherent power in every case where text-based authority applies." GMD Br. 18 (quoting *Chambers v. NASCO*, 501 U.S. at 64-65 (dissenting opinion)). That is so for three reasons. *First*, Rule 65 *is* "text-based authority." [20]

Second, even if Rule 65 did not exist, text-based authority (such as Rule 64) does *not* impliedly exclude other authority (such as federal equitable power), even if that

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[19] *See Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("The Secretary's reading of the statute is too grudging. Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."); *Hecht Co. v. Bowles*, 321 U.S. at 329-30 ("[I]f Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain. Hence we resolve the ambiguities [of the Act] in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices . . . ."); *Brown v. Swann*, 35 U.S. (1 Pet.) 497, 503 (1836) ("The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.").

[20] Although GMD asserts (GMD Br. 18 n.9) that Rule 65 "does not itself authorize preliminary injunctive relief," it has long been understood that Rule 65 "may be read as a codification of the traditional federal equity practice." 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2943, at 79 (2d ed. 1995).

other authority has not yet been reduced to rule. GMD's sole support for the notion that this Court must rely exclusively on textual authority is a *dissenting* opinion in a case concerning inherent power. *See* GMD Br. 18 (quoting *Chambers*, 501 U.S. at 64-65 (dissenting opinion)). Whatever the merits of that dissent, the Court held that "the inherent power of a court can be invoked *even if procedural rules exist which sanction the same conduct*." *Id.* at 49 (emphasis added; referring to FED. R. CIV. P. 11).[21]

Third, this Court implicitly rejected GMD's contention (GMD Br. 18) that Rule 64 is "the exclusive source of district court authority to grant provisional remedies" in *De Beers*. In that case, the Court observed that "[t]he Government disclaims any benefit from Rule 64," because "there is no federal statute" and New York law will not issue an attachment "in an equity suit such as the instant one." *De Beers*, 325 U.S. at 218. Under GMD's exclusive-authority theory, the Court's opinion should have ended there. It did not. Instead, the Court embarked on an extended analysis of whether the preliminary injunction in that case was consistent with "the principles of equity." *Id.* at 219. Although the Court ultimately held that the injunction was not consistent with those principles, its analysis makes plain that the unavailability of prejudgment attachment under Rule 64 does not foreclose the availability of a preliminary injunction against the dissipation of assets under Rule 65.

2. Even if federal equitable power were subject to implied limitations—which it is not—Rule 64 would not even impliedly limit Rule 65 because the two rules originated and operate independently of each other. Before 1938, separate rules governed actions at law and suits in equity in the federal courts. Rule 64 originated in statu-

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[21] Other examples in which a federal rule and uncodified federal power co-exist include *in limine* rulings, *see Luce v. United States*, 469 U.S. 38, 41 n.4 (1984), and the qualified work product immunity, *see* JAMIE GORELICK ET AL., DESTRUCTION OF EVIDENCE § 3.5, at 80 (1989).

tory provisions governing prejudgment attachment in actions at law.[22] By contrast, Rule 65 originated in Federal Equity Rule 73.[23] The two rules thus originated on separate sides of the division between law and equity and each operated independently of the other. The fusion of law and equity did not bring them into conflict. *See Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368, 382 n.26 (1949) ("Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected."); 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 65 App. 101[2], at 65 App.-14 (3d ed. 1998) ("Rule 64 does not deal with the equitable remedy of injunction."). As one commentator concluded: "While Rule 65 does not attempt to state when the equitable injunction is proper, to hold

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22 Rule 64 originated in the Judiciary Act of 1872, which governed actions at law. *See* Judiciary Act, ch. 255, §§ 5-6, 17 Stat. 196, 197 (1872). One part of that Act, known as the Conformity Act, required federal district courts to apply "as near as may be" the procedure applicable to actions at law in the states in which they sat. *See* Revised Statutes § 914, 28 U.S.C. § 724 (1940). Section 915 of the Conformity Act incorporated state attachment law. *See* Revised Statutes § 915, 28 U.S.C. § 726 (1940). In 1937, Rule 64 adopted and superseded § 915 of the Conformity Act, which was formally repealed in 1948. *See* FED. R. CIV. P. 64 advisory committee's note (1937). Rule 64 has never been amended.

23 Federal Rule of Civil Procedure 65 originated in Rule 73 of the Federal Equity Rules of 1912. *See* Rules of Practice for the Courts of Equity of the United States, 33 S. Ct. xix, xxxix (Nov. 4, 1912). The Clayton Act of 1914 largely adopted Equity Rule 73. *See* 28 U.S.C. §§ 381, 382, 383 (1940). Rule 65, in turn, essentially restated §§ 381, 382, and 383. *See* FED. R. CIV. P. 65 advisory committee's note (1937); *see also* RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 336 (William W. Dawson ed., 1938) ("Passing to Rule 65: This is largely the re-enactment, so to speak, of the present statutory provisions. Paragraphs (a) and (b) are taken from Title 28, Section 381, and the rule is substantially the same, also, as Equity Rule 73."). Sections 381, 382, and 383 were formally repealed in 1948. *See* 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 65App.101[1], at 65App.-12 (3d ed. 1998).

that the grant or denial of such an injunction is generally dependent upon state law pursuant to Rule 64 would have completely uprooted federal practice as it was when the Federal Rules were promulgated in 1937, which was not intended." 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 64.04[3], at 64-19 (2d ed. 1996).[24]

III. THIS COURT'S DECISION IN *ERIE R.R. CO. v. TOMPKINS* DOES NOT REQUIRE REVERSAL OF THE JUDGMENT BELOW

This Court should not consider the *Erie* issue because GMD raises it for the first time in this Court. If the Court is inclined to reach that issue regardless, it should hold that *Erie* does not require reversal of the judgment below. There is no conflict between New York law and federal law. Even if they were in conflict, the district court properly applied federal law.

A. The *Erie* Issue Is Not Properly Before The Court Because It Is Not Fairly Included In The Question Presented And Was Not Pressed Or Passed On By Any Court Below

In this Court, parties may not raise issues that are not fairly included in the question presented and pressed or passed on by the lower court. GMD's opening brief on the merits violates both rules. It rewrites the question presented and briefs an issue neither pressed nor passed on by any court below. In accordance with its consistent practice, the Court should decline to address the *Erie* issue. *See* 22 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 405.03[2], at 405-16 (1998).

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24 Contrary to GMD's contention (GMD Br. 19-20), the preliminary injunction here was not an attachment in disguise. It gave the investors neither a lien nor a security interest. At any time, GMD was free to place its assets into an insolvency proceeding under Mexican or any other applicable law. *See supra* p. 6.

1. *The* Erie *Issue Is Not Fairly Included In The Question On Which The Court Granted Review*

The rules of this Court plainly limit the issues to those fairly included in the question presented. Rule 14.1(a) provides that: "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." *See Yee v. City of Escondido,* 503 U.S. 519, 535-36 (1992) (explaining importance of Rule 14.1(a)). Rule 24.1(a) similarly provides that a Supreme Court merits brief should not "raise additional questions or change the substance of the questions already presented in [the petition]." *See, e.g., Taylor v. Freeland & Kronz,* 503 U.S. 638, 646 (1992) (refusing to consider an argument raised for the first time in petitioner's opening merits brief on the authority of Rules 14.1 and 24.1(a) and stating that "alter[ation]" or "addition[s]" to the questions presented would, absent unusual circumstances, thwart "the integrity of the process of certiorari"); *see also Bragdon v. Abbott,* 118 S. Ct. 2196, 2205 (1998); *Blessing v. Freestone,* 117 S. Ct. 1353, 1359 n.3 (1997).

The *Erie* issue is not fairly included in the question on which the Court granted certiorari and the Court should not address it. In its merits brief, GMD expanded the question presented in the certiorari petition by adding the phrase "in diversity jurisdiction" in order to raise the *Erie* issue. Before its opening merits brief in this Court, GMD had not raised the Rules of Decision Act, 28 U.S.C. § 1652, or *Erie R.R. Co. v. Tompkins,* 304 U.S. 64. Hence, at the time it granted certiorari, this Court had no warning that, in GMD's view, the rule of decision was supplied not by federal law, but by state law. To permit GMD to use a circuit conflict on a federal-law issue as bait, and then switch to a state-law issue on the merits, would destroy the integrity of this Court's certiorari process.

2. *This Court Should Not Entertain The* Erie *Issue Because It Was Neither Pressed Nor Passed On By Any Court Below*

"[O]rdinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller,* 425 U.S. 231, 234 n.1 (1976); *see, e.g., Sisson v. Ruby,* 497 U.S. 358, 359 n.1 (1990); *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970). Because GMD did not press the *Erie* issue in either of the courts below, and because neither of those courts passed on that issue, it is not properly before this Court. Not only did GMD waive the *Erie* issue, but it would be inappropriate for this Court to resolve a purported conflict between federal and state law without the benefit of opinions from the courts most familiar with the relevant state law. *See, e.g., Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 499-500 (1985) ("district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States"). Deciding the *Erie* issue in the absence of guidance from the lower courts is especially hazardous where, as here, the parties disagree on the content of state law.

B. Even If State Law Governs The Issuance Of Injunctions By Federal Courts In Diversity Cases, The Preliminary Injunction Entered In This Case Is Consistent With Applicable New York Law

Even if GMD is correct that the district court should have applied New York law in determining whether to issue the injunction, no *Erie* concern is raised because the injunction was consistent with applicable New York law. *Erie* holds that a federal court exercising diversity jurisdiction should, in essence, apply substantive state law and federal procedural law. Federal law conflicts with state law only when there is an "unavoidable clash" between the federal rule and the state law. *Walker v. Armco Steel*

Corp., 446 U.S. 740, 749-50 (1980). A review of New York law reveals that the federal rule and state law agree.

New York law authorizes preliminary injunctions to preserve the *status quo* and protect against actions that would tend to render the judgment ineffectual:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual . . . .

N.Y.C.P.L.R. § 6301 (McKinney 1980). Although GMD cites C.P.L.R. § 6301 for the proposition that New York law does not provide for preliminary injunctive relief "in an action for money damages" (GMD Br. 27), the text of the statute does not exclude actions for money damages.[25] To be sure, the general rule in New York (and elsewhere) is that: "Where a plaintiff is seeking money damages for tort or breach of contract, a preliminary injunction generally is not appropriate to provide security for a potential recovery." JACK WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE ¶ 6301.10, at 63-27, 63-28 (1998). But where a preliminary injunction is intended to preserve the *status quo* and protect the court's ability to render an effectual judgment, that rule does not apply. *See, e.g., Zonghetti v. Jeromack*, 541 N.Y.S.2d 235, 237 (App. Div. 2d Dep't 1989) ("[T]he uncontrolled sale and disposition by the defendants of their assets would threaten to render ineffectual any judgment which plaintiffs might obtain. Given the underlying realities of this particular

[25] GMD also suggests (GMD Br. 26) that the repeal in the Civil Practice Law and Rules ("CPLR") of section 878(2) of the Civil Practice Act ("CPA") somehow limited New York courts' powers to issue injunctions in actions for money damages. That suggestion is incorrect. Section 878(2) was replaced by Article 62 of the CPLR, "Attachment," and has no relation to Article 63, "Injunction." The predecessor CPA section to CPLR 6301, is section 878(1), which is essentially reproduced in the CPLR.

situation, we find the status quo is best preserved by the granting of the preliminary injunction.") (internal quotations and citations omitted); WEINSTEIN ET AL., *supra* p. 44, ¶ 6301.11, at 63-31 (identifying exception to general rule where "there is a showing that the defendant is dissipating assets or proceeds that would otherwise be available to a victorious plaintiff."); *see also H.I.G. Capital Management, Inc. v. Ligator*, 650 N.Y.S.2d 124, 125 (App. Div. 1st Dep't 1996) (injunction restraining the transfer of assets was justified under arbitration statute and would also have been within court's discretion, "[e]ven were standards of CPLR article 63 applicable," where "[t]he uncontrolled disposal of respondents' assets, which might render an award ineffectual, presents the risk of irreparable harm").[26]

New York courts also issue preliminary injunctions based on that State's common law to preserve the *status quo*—even where the plaintiff seeks money damages. *See, e.g., Ma v. Lien*, 604 N.Y.S.2d 84, 85 (App. Div. 1st Dep't 1993) (granting preliminary injunction to place periodic payments from winning lottery ticket in escrow where ticket holder intended to share his winnings with his family, because "if the requested relief is not granted, a substantial amount of money may be dissipated or otherwise unavailable for recovery"); *Pando v. Fernandez*, 508 N.Y.S.2d 8, 9 (App. Div. 1st Dep't 1986) (*semble*); *R. Prescott & Son v. Nye*, 228 N.Y.S. 156, 158 (App. Div. 3d Dep't 1928) ("It appears that Nye is insolvent,

[26] The cases cited by GMD (GMD Br. 27) for the contrary proposition are inapposite. In both cases, the courts held that the plaintiffs had failed to demonstrate irreparable injury because they had not demonstrated that the defendants were in financial distress and thus likely to be unable to pay or able to prevent a meaningful recovery. *See Daley v. Related Cos., Inc.*, 581 N.Y.S.2d 758, 762 (App. Div. 1st Dep't 1992); *Rosenthal v. Rochester Button Co.*, 539 N.Y.S.2d 11, 13 (App. Div. 1st Dep't 1989). By contrast, in this case, the district court found that GMD had a "negative net worth of approximately $214 million" and was "at risk of insolvency if not already insolvent." Pet. App. 25a.

and that, if the money came into his hands, it would immediately be seized by other creditors, and any lien plaintiff has will be lost. . . . [A] temporary injunction order would seem a proper remedy to preserve the property in statu quo. . . ."); *see also Air Traffic Conference v. Downtown Travel Ctr., Inc.*, 383 N.Y.S.2d 805, 807 (Sup. Ct. N.Y. County 1976); *Rolnick v. Rolnick*, 230 N.Y.S.2d 789, 791 (Sup. Ct. Queens County 1962).

In sum, the statutory and common law of New York both authorize the issuance of preliminary injunctions against the dissipation of assets to preserve the *status quo* and protect the court's ability to render effectual relief. Because the district court has the same power under federal and New York law, and because GMD concedes that the preliminary injunction properly issued if power to order it exists (*see* GMD Br. 7), it follows that this Court need not decide the *Erie* issue and may simply affirm the interlocutory order.

C. Under This Court's Decision In *Hanna v. Plumer*, Federal Law Governs The Issuance Of Injunctions By Federal Courts Because Rule 65 Governs That Procedure

When a Federal Rule of Civil Procedure governs an issue, a court sitting in diversity should apply that rule even in the face of conflicting state law. *See Hanna v. Plumer*, 380 U.S. at 471. In *Hanna*, this Court prescribed the analysis for determining whether a Federal Rule of Civil Procedure should be applied. *Erie* plays no part in this analysis as long as the Federal Rule governs the situation. *See id.* at 470-71. If the Federal Rule governs, this Court asks whether the Rule exceeds the authority granted by Congress in the Rules Enabling Act ("REA") or violates the Constitution. *See id.* at 463-64. As long as the answer to both questions is "no," the Federal Rule applies regardless of contrary state law. *See id.* at 473-74.

Rule 65 authorized the preliminary injunction entered by the district court below (*see, e.g.*, 11 CHARLES ALAN

WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2493, at 390 (1973)) and is well within the bounds of the REA and the Constitution. Rule 65 simply reduced statutory power to rule and thus could not possibly "abridge, enlarge, or modify any substantive right" within the meaning of the REA.

D. Alternatively, Even If Federal Law Conflicted With State Law, The Federal Interest In Having Uniform Equitable Remedies And Entering Effectual Judgments Outweighs Any Asserted State Interest In Discouraging Forum Shopping Between State And Federal Courts

If Rule 65 does not govern the preliminary injunction issued below, the question is whether the federal law is procedural, in which case it was properly applied, or substantive, in which case the state law should have been applied. In an early interpretation of *Erie*, this Court set forth an "outcome-determination" test to answer that question: "[D]oes it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim in a State court?" *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945). The Court subsequently qualified *Guaranty Trust*, holding in *Hanna* that choices between state and federal law are to be made not by application of any automatic, "litmus paper" criterion, but rather by reference to the policies underlying the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws. *Hanna*, 380 U.S. at 467.

Preliminary injunctions are a provisional remedy and do not determine the ultimate outcome of litigation. Therefore, the federal law governing preliminary injunctions is procedural.[27] As such, it was properly applied in

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[27] Although this Court has not addressed the issue, lower federal courts agree that the decision whether to issue a preliminary injunction is one of procedure. *See, e.g., Glude v. Sterenbuch*, 133 F.3d 914 (4th Cir. 1998) (unpublished disposition); *Elliott v. Kiesewetter*, 98 F.3d 47, 52 (3d Cir. 1996); *Southern Milk Sales,*

this case. *Guaranty Trust*, 326 U.S. at 108-09; *see also Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536 (1958) (federal courts should conform to state rules "where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court").

Even if the choice between federal and state law were determinative of the outcome, this Court applies federal law if a strong federal policy is implicated. *See Byrd*, 356 U.S. at 537-38. In *Byrd*, the Court held that *Erie* did not require a district court sitting in diversity to follow South Carolina decisional law, which allocated a determination to the judge, over federal practice, which allocated the same determination to the jury. The Court reasoned that the federal rule affected the "essential characteristics" of the federal courts and should not yield to a contrary state rule in a diversity case. Such rules necessarily implicate a "strong federal policy" precisely because "[t]he federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction." *Id.* The Court emphasized that state law cannot be allowed to disrupt or "alter the essential character or function of a federal court." *Id.* at 539 (quoting *Herron v. Southern Pacific Co.*, 283 U.S. 91, 94 (1931)); *see also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 431-32 (1996) (citing *Byrd*'s holding that the "outcome determination" test is insufficient in cases involving countervailing federal interests and applying the *Byrd* analysis to the federal interest at stake there).[28]

Inc. v. Martin, 924 F.2d 98, 101-02 (6th Cir. 1991); *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1448 (11th Cir. 1991); *Equifax Servs., Inc. v. Hitz*, 905 F.2d 1355, 1361 (10th Cir. 1990); *Jackson Dairy v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979); *General Electric v. American Wholesale Co.*, 235 F.2d 606, 608 (7th Cir. 1956); *see also* CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, *supra* p. 46, § 2493, at 390.

[28] This Court in *Hanna* similarly emphasized the importance of uniformity in the federal courts in matters relating to the administration of legal proceedings,

Equitable power is an essential characteristic and function of the federal courts. Congress vested the federal courts with equity jurisdiction in the first Judiciary Act and has repeatedly reaffirmed that decision over the succeeding two centuries. That policy decision, which informed and is codified in part in Rule 65, merits the respect of this Court. It should not yield lightly to state law that, at most (accepting *arguendo* GMD's view of New York law), fails to aid plaintiffs in actions for money damages and embodies no considered policy to leave them without remedy. As the *Guaranty Trust* Court explained:

> State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. . . . [A] federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it.

326 U.S. at 106; *see also Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 45-46 (1909) ("This controversy is within the equity jurisdiction of the courts of the United States, as heretofore recognized in this court, and such jurisdiction cannot be limited or in anywise curtailed by state legislation as to its own courts."); *Payne v. Hook*, 74 U.S. (1 Wall.) 425, 430 (1868) ("The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union.").

"an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules. The purpose of the *Erie* doctrine . . . was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers—when there are 'affirmative countervailing [federal] considerations' and when there is a Congressional mandate (the Rules) supported by constitutional authority."

380 U.S. at 472-73 (*quoting Lumberman's Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be dismissed as moot. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 16, 1999

APPENDIX

APPENDIX

STATUTORY PROVISIONS AND RULES INVOLVED

Federal Rule of Civil Procedure 64 provides as follows:

Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Section 915 of the Revised Statutes, 28 U.S.C. § 726 (1940) (repealed 1948) provided as follows:

In common-law causes in the district courts the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which were on June 1, 1872, provided by the laws of the State in which such court is held for the courts thereof; and such district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process. Similar preliminary affidavits or proofs, and similar security, as required by State laws, shall be

first furnished by the party seeking such attachment or other remedy.

Sections 5 and 6 of the Judiciary Act of 1872, ch. 255, 17 Stat. 196, 197 (repealed 1948) provided as follows:

Sec. 5. That the practice, pleadings, and forms and modes of proceedings in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: *Provided, however*, That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.

Sec. 6. That in common-law causes in the circuit and district courts of the United States the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided for by the laws of the State in which such court is held, applicable to the courts of such State; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the State in relation to attachments and other process; and the party recovering judgment in such cause shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided by the laws of the State within which said circuit or district courts shall be held in like causes, or which shall be adopted by rules aforesaid: *Provided*, That similar preliminary affidavits or proofs, and similar security as required by such laws, shall be first furnished by the party seeking such attachment or other remedy.

* * * * *

Federal Rule of Civil Procedure 65 provides in pertinent part as follows:

Injunctions

(c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of any officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) **Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Sections 17, 18, and 19 of the Clayton Act of 1914, 28 U.S.C. §§ 381, 382, and 383 (1940) (repealed 1948) provided as follows:

§ 381. **Same; preliminary injunctions and temporary restraining orders.**

No preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the

verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Nothing in this section contained shall be deemed to alter, repeal, or amend section 380 of this title.

§ 382. **Same; security on issuance of.**

Except as otherwise provided in section 26 of Title 15, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

§ 383. **Same; requisites of order; binding effect.**

Every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

Equity Rule 73 of the Rules of Practice for the Courts of Equity in the United States (repealed 1948) provided as follows:

Preliminary Injunctions and Temporary Restraining Orders

No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or

judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.